UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION,

MDL NO. 1407

ORDER DENYING DEFENDANT ELAN PHARMACEUTICALS, INC.'S MOTION TO DISMISS

This document relates to:

Michael and Virginia Skurow v. Procter & Gamble Pharmaceuticals, Inc., et al., No. 5-cv-379.

Defendant Elan Pharmaceuticals, Inc., individually and as successor to Dura Pharmaceuticals, Inc. ("Elan") moves this court to dismiss plaintiffs' claims against it pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. Specifically, Elan claims that (i) plaintiffs' claims are time-barred, and (ii) the Amended Complaint states allegations of fraud which are not pled with particularity. Having reviewed the motion, the response filed, and the reply thereto, the court hereby finds and rules as follows:

I. BACKGROUND

Plaintiff Michael Skurow allegedly ingested the prescription

medication Entex LA on March 25, 1998 and suffered an ocular stroke. Mr. Skurow and his wife commenced an action in the Circuit Court of Orange County, Florida by filing a complaint on November 15, 2004. The amended complaint alleges direct claims of negligence and strict liability, and derivative loss of consortium claims. The action was removed to the United States District Court for the Middle District of Florida. It was then transferred to MDL 1407 and this court on March 8, 2005.

II. ANALYSIS

A. Motion to Dismiss Standard

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of plaintiffs' claims. Dismissal is appropriate under the rule if plaintiffs' allegations fail to state a claim upon which relief can be granted. See Fed.R.Civ.P. 12(b)(6). The motion should not be granted unless it appears beyond a doubt that plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. See Conley v. Gibson 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). The court must accept plaintiffs' allegations as true for the purpose of the motion. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

B. Plaintiffs' Action is Timely

The parties do not dispute that under Florida law, the statute of limitations relating to these personal injury claims is four years. Fla.Stat. §§ 95.031(2)(b); 95.11 (3)(a),(e) (plaintiff must commence action within four years "from the date that the facts giving rise to the cause of action were

discovered, or should have been discovered with the exercise of due diligence"). The plaintiffs filed more than four years after the date of Mr. Skurow's alleged injury. Therefore, the viability of plaintiffs' claims must be assessed pursuant to Florida's discovery rule. The Florida Supreme Court has stated that the factors bearing on the issue of when the facts giving rise to the cause of action should have been discovered, include: (1) awareness of the existence of a serious physical injury; (2) knowledge that the particular drug had been administered; and (3) constructive knowledge of medical opinion in the hospital that the drug may have contributed to the injury. Babush v. American Home Products Corporation, 589 So.2d 1379, 1381 (Fla. 4th DCA 1991) citing Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976). The court speaks, too, of knowledge by the plaintiffs of the possible invasion of their rights. Babush, 589 So.2d at 1381.

The applicability of the discovery rule to a cause of action is dependent upon when plaintiff discovered the cause of the injury in question, however, "when one, by the exercise of reasonable diligence, should have discovered such a cause, is to be determined by the trier of fact and not by the court in a summary proceeding." See Schetter v. Jordan, 294 So.2d 130 (Fla. 4th DCA 1974); see also, Edward v. Ford, 279 So.2d 851 (Fla. 1973).

In the present case, plaintiffs admit that the November 6, 2000 FDA Public Health Advisory may have placed the consuming public on notice of the alleged association between PPA and

stroke. However, the plaintiffs also repeatedly allege that they had no knowledge that the PPA-containing product Mr. Skurow ingested may have caused his stroke until the Spring of 2002 when plaintiffs saw an advertisement on television.[1] Since it is plaintiffs' testimony that they were unaware until Spring 2002 that the PPA-containing product Entex LA may have caused his stroke, the jury is entitled to make a determination as to this genuine issue of material fact. Therefore, the court will deny defendant's motion to dismiss.[2]

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[1]Defendants contend that knowledge of the medical community must be imputed to plaintiffs. However, there is no indication that Mr. Skurow should have known from his own medical records that there was a casual connection between the drug and his injury. Nor can the court say as a matter of law that the existence of the medical literature and other published studies was enough to put plaintiffs on notice that their legal rights had been violated. See, e.g., Babush, 589 So.2d at 1382.

[2]This case is distinguishable from the court's recent decision in LaFrance v. Dura, et al., No. 2-cv-1743. In LaFrance, plaintiff did not deny seeing the November 6, 2000 FDA Advisory, but denied knowing that the product she took contained PPA. However, plaintiff was aware that she suffered a stroke and that she ingested a cold and cough medicine prior to her stroke. Under such circumstances, the court determined that the November 6, 2000 FDA Advisory put plaintiff on notice that she had a potential claim and had one year (under Louisiana law) from that date to discover the casual relationship between defendant's product and her injury.

CONCLUSION

Based on the foregoing, the court DENIES Elan's motion to dismiss the claims against it.

DATED at Seattle, Washington this 8th day of November, 2005.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT COURT
JUDGE